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THE STORIES WE TELL, AND HAVE TOLD, ABOUT TRIBAL SOVEREIGNTY: LEGAL FICTIONS AT THEIR MOST PERNICIOUS

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“I can’t believe *that!*” said Alice,
“Can’t you?” the Queen said, in a pitying tone. “Try again: draw a long
breath, and shut your eyes.”

Alice laughed. “There’s no use trying,” she said; “one can’t believe
impossible things.”

“I dare say you haven’t had much practice,” said the Queen. “When I
was your age I always did it for half an hour a day. Why, sometimes I’ve
believed as many as six impossible things before breakfast.”¹

I. INTRODUCTION

STARTING with Chief Justice John Marshall and continuing through to the present Supreme Court, the story of Indian sovereignty has been consistent—it exists only in the most diminished form. Some reasons for this have been premised on the incapacity of Indians to self-govern; others on theories of federalism; while still others on the ambitions of non-Indians. However, the factual premises behind the concept of diminished sovereignty are baseless—legal fictions about the conquest of Indians and their nature. These fictions originated in Chief Justice Marshall’s Indian Law Trilogy and should have vanished long ago when their original purposes were fulfilled, like other legal fictions that are no longer useful. This Article examines the reasons for the persistence of Marshall’s fictions in the face of contradictory evidence and the harm they have done to the cause of tribal sovereignty and Indians in general. My conclusion is that their endurance has less to do with serving some intellectual purpose or maintaining stability in the law—traditional justifications for the continua-

* Professor of Law, Georgetown University Law Center. This Article is based on a paper I delivered at the Villanova Law Review Norman J. Shachoy Symposium, *Sovereign Seductions: Reconciling Claims to Govern*, September 11, 2009.

1. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811 n.7 (1935) (quoting LEWIS CARROLL, *THROUGH THE LOOKING GLASS* ch. 5 (1871)).

tion of a legal fiction—than with hiding a normative judgment that Indians should not exist as a separate people.²

In support of that thesis, this Article briefly discusses the origin of the modern concept of diminished tribal sovereignty in Marshall's Indian Law Trilogy. This discussion points out the dissonance between the fictions Marshall propounded in support of that concept and the actual record he should have considered in reaching his decisions. The Article then turns to the legal fiction doctrine and briefly identifies the traditional functions it performs as well as the doctrine's hidden dangers. This part of the Article shows how Marshall used legal fictions in his Trilogy and speculates about why he used them.³ The third part of the Article describes the harm that Marshall's use of the legal fiction doctrine has done to the cause of tribal sovereignty and Indians in general. Based on their pernicious effect, the Article concludes that Marshall's fictions are "bad" legal fictions⁴ that should, and can, be expunged from federal Indian jurisprudence; their momentary usefulness, long outlived.

II. MARSHALL'S INDIAN LAW TRILOGY

Indian tribes both before and immediately after Europeans colonized North America had complete authority over their respective territories and peoples and thus met most definitions of sovereignty.⁵ Yet, the story English colonists and eventually American courts told themselves about the area's native inhabitants was quite different. It was a story filled with fabrications about the character and nature of Indians, their pre-discovery capacity to self-govern, and the effect that European discovery had on

2. See Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Re-invigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 509-17 (2005) (discussing extent to which these efforts have been successful).

3. I am not the first to examine the legal fictions in *M'Intosh*. See generally Jen Camden & Kathryn E. Fort, "Channeling Thought": *The Legacy of Legal Fictions From 1823*, 33 AM. INDIAN L. REV. 77 (2009) (exposing many fictitious underpinnings of that case); see also Naomi Mezey, *Law's Visual Afterlife: Violence, Popular Culture and Translation Theory*, in IMAGINING LEGALITY: WHERE LAW MEETS POPULAR CULTURE (forthcoming 2011) (manuscript at 2, 12, on file with author) (describing Marshall's opinion in *M'Intosh* "in a real estate sense, a legal killing," and commenting that "[p]erhaps nowhere is the sovereign's legitimacy through might and the violence of legal interpretation so vividly instantiated than in John Marshall's opinion in *Johnson v. M'Intosh*").

4. See LON FULLER, *LEGAL FICTIONS* 4 (1967) (wondering if there are good and bad legal fictions and how to distinguish between them).

5. See Babcock, *supra* note 2, at 448-55 (discussing traditional and more modern definitions of sovereignty); see also Katherine A. Hermes, *Jurisdiction in the Colonial Northeast: Algonquian, English and French Governance*, 43 AM. J. LEGAL HIST. 52 (1999) (discussing tribal sovereignty in terms of territorial, personal, and subject matter jurisdiction before King Phillips' War).

them; a fable that the Marshall Court wove into paralytic legal doctrine⁶ and which, over time, acquired “the patina of fact.”⁷

The fable about conquest and the diminished capacity of Indians began in the Marshall Indian Law Trilogy;⁸ three cases decided in the early 19th century during the presidencies of John Quincy Adams and Andrew Jackson.⁹ Two of these opinions, *Johnson v. M'Intosh*¹⁰ and *Cherokee Nation v. Georgia*,¹¹ forever set in stone the legal fictions that permeate the entire history of federal Indian jurisprudence. The empirical record was quite different; it shows European nations and later colonial governments engaging through the treaty process with comparatively sophisticated Indian tribes that were fully self-governing and self-sufficient. Although Marshall tried in *Worcester v. Georgia*,¹² the third opinion in the Trilogy, to correct the factual inaccuracies that permeate his two prior decisions, it was too late. The damage to the cause of Indian sovereignty had been done and would prove to be irreversible.

Marshall used Indian tribes in the three cases that compose his Indian Law Trilogy as a vehicle to delineate the relationship between the federal government and the states and to show the American public that the new central government could, in fact, govern.¹³ He particularly used the first case, *M'Intosh*, to reassure the public that it need not fear an unrestrained

6. See generally Camden & Fort, *supra* note 3 (discussing mutually reinforcing themes of James Fenimore Cooper's *Pioneers*, which “popularized the fictions of the ‘vanishing Indian,’” and *M'Intosh*, which “created the legal fiction of discovery and conquest to ensure a smooth chain of title—and permanently dispossess tribes of full title to their land in Anglo-American courts”).

7. See *id.* at 79.

8. Charles F. Wilkinson first referred to *M'Intosh*, *Cherokee Nation*, and *Worcester* as the “Marshall Trilogy.” See DAVID H. GETCHES, DANIEL M. ROSENFELT & CHARLES F. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 42-45 (1st ed. 1979).

9. The question of Indian title to land and the capacity of tribes to sell that land arose earlier in *Fletcher v. Peck*, 10 U.S. 87 (1810), where the Court concluded that Georgia only had a preemptive property right in tribal lands through entering into a treaty with the Indians or by purchasing the land from them.

10. 21 U.S. 543 (1823) (finding defendant's title to disputed land acquired from United States superior to plaintiff's title acquired when he purchased land from Indian tribe).

11. 30 U.S. 1 (1831) (holding that Court was without jurisdiction to enjoin application of Georgia's laws on Cherokee reservation because tribes were neither states nor foreign nations).

12. 31 U.S. 515 (1832) (holding that laws of Georgia had no power on Cherokee lands).

13. See Christopher L. Eisgruber, *John Marshall's Judicial Rhetoric*, 1996 SUP. CT. REV. 439, 441 (1996) (contrasting modern judges' preoccupation with persuading general public that courts “posed no threat to majoritarian institutions” with Marshall's goal of convincing “people that national institutions, including the federal judiciary, could govern well”). On the topic of why Marshall chose issues involving Indian tribes, see Babcock, *supra* note 2, at 479 n.156 (speculating that Constitution's clear resolution of debate over where authority over Indians should lie in favor of federal government, by conferring on Congress sole authority to regulate Indian affairs, as one reason Marshall may have selected Indian tribes as “easy first step” to advance his broader Federalist political agenda).

federal judiciary that might run roughshod over popular expectations.¹⁴ Despite their oblique purpose with respect to the cause of Indian sovereignty, some of the more damaging principles announced in Marshall's decisions continue to have controlling effect in the field of Indian law,¹⁵ and have never been directly overruled.¹⁶

The first case in the Trilogy, *M'Intosh*, involved a property dispute between two parties, both claiming title to the same tract of land. One claimant based his title on tribal grants "obtained . . . without the consent of the United States"; the other, on "subsequent federal land patents, issued after the [entire] area had been ceded to the United States by a tribal treaty."¹⁷ The case presented Marshall with an opportunity to reaffirm the primacy of the federal government. However, he had to do this in a way that neither disturbed previously settled expectations about land title nor threatened the security of the new nation by dishonoring the many treaties and proclamations protecting Indian land and sovereignty.¹⁸

Marshall resolved this dilemma by employing his first legal fiction. In this fiction, he converted a two-centuries-old European doctrine granting the discovering nation preemptive rights to treaty with native inhabitants into a doctrine vesting title to Indian lands in the discovering nation re-

14. See *M'Intosh*, 21 U.S. at 591-93 ("However this restriction may be opposed to a natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.").

15. See, e.g., *United States v. Kagama*, 118 U.S. 375, 384-85 (1886) (citing *Worcester* as one basis for upholding plenary authority of Congress over internal Indian affairs, and saying that federal power over Indians "must exist in that government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all tribes").

16. See *Nevada v. Hicks*, 533 U.S. 353, 362 (2001) (abandoning, although not directly overruling, *Worcester's* holding that state laws lack force on Indian reservations).

17. See RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 45 (1980). Marshall had avoided addressing the same issues of Indian title to land and tribal sovereignty in two earlier decisions: *Fletcher v. Peck*, 10 U.S. 87 (1810), a case involving title to lands in Georgia, ignoring the fact that Indians occupied the land in dispute and the lack of any indication in the record that anyone, including the State (a source of title for one claimant), had bought the land from them, and *New Jersey v. Wilson*, 11 U.S. 164 (1812), a case sustaining the tax exempt status of land that had been previously purchased from a tribe even though the state legislature had repealed the tax exemption after the sale, basing the decision on the Contract Clause. See BARSH & HENDERSON, *supra*, at 38-39 (discussing these opinions in greater detail).

18. If the Court had ruled that Indians held fee simple title to their land, they could then sell their land to anyone, divesting current landowners who had been granted title to their land by Britain, France, or Spain while Indians still occupied the land. This would make it more difficult for the central government "to control the disposition of newly acquired land outside the original 13 states." Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 208 n.69 (1984).

gardless of whether treaties had been entered into.¹⁹ He then fictionalized the discovery doctrine further by saying that Indians had, in fact, been conquered because they had continued to “coexist” peacefully with the United States.²⁰ Although he recognized that his “spin”²¹ on the discovery doctrine was an “extravagant pretension,” he declared it to be “the law of the land,” which could not be questioned,²² thus transforming his twin fictions of discovery and conquest into irrefutable premises that justified his holding.²³ By resting his decision on what he declared to be “safe and fundamental principles,” he hoped his reasoning would be more per-

19. See BARSH & HENDERSON, *supra* note 17, at 47 (describing discovery doctrine as “two-centuries-old convention among European nations that discovery vested in the discoverer an exclusive ‘preemptive’ entitlement to deal with the natives as against other European crowns”); see also *Fletcher*, 10 U.S. at 147 (Johnson, J., dissenting). Justice Johnson in *Fletcher* states:

What then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed by the first settlement of the country, to wit, a right of conquest, or of purchase, exclusively of all competitors, within certain defined limits. . . . The various state cessions [of tribal land within boundaries] to the United States between 1783 and 1802 merely quitclaimed any “right of discovery” they might have had to western tribal lands.

Fletcher, 10 U.S. at 147 (Johnson, J., dissenting). Under a more accurate understanding of the discovery doctrine, the United States was not an owner of Indian lands, but a “protector of Indian interests in their lands and stood first in line should a tribe choose to sell any of its lands.” David A. Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY U. L. REV. 277, 308 (1998).

20. See Wilkins, *supra* note 19, at 308.

21. See Eisgruber, *supra* note 13, at 447-48 (saying that when Marshall’s arguments rested upon “a controversial empirical claim,” he would merely “assert or imply the necessary facts,” and also noting that while Marshall would “spin out the implications of his premises rigidly and emphatically,” he would “leave the premises themselves unjustified and sometimes unstated”); see also Mezey, *supra* note 3, at 2 (Marshall’s “opinion is one marked by a certain awareness of how grandiose the claims to authority over the territory of the country are, how momentous the decision, and that awareness makes the rhetorical performance all the more exhaustively and violently asserted”).

22. See *Johnson v. M’Intosh*, 21 U.S. 543, 591 (1823). Konkle points out that Marshall’s self-characterization of what he had done in *M’Intosh* shows he knew that “settlers clearly understood that North America was inhabited by politically autonomous groups of Indians who defended their territory and their government authority,” and that by denying Indian natural rights—rights that precede positive, European law—he violated “the law of nations in order to support a system of government ostensibly founded on the same republican principles.” Maureen Konkle, *Indian Literacy, U.S. Colonialism, and Literary Criticism*, 69 AM. LITERATURE 457, 462 (1997); see also BARSH & HENDERSON, *supra* note 17, at 47-49; Jill Norgren, *The Cherokee Nation Cases of the 1830s*, 1994 J. SUP. CT. HIST. 65, 72 (1994) (calling Marshall’s reading of history “corrupt”).

23. See Camden & Fort, *supra* note 3, at 85 (explaining use of legal fictions to make “a smooth rule of law,” and saying, “[b]y acknowledging the fiction, but accepting its basis, the fiction becomes a rule of law and justifies the actions taken by the court”).

suasive to the general public.²⁴ Although Marshall's reconstituted discovery doctrine enabled him to achieve his dual goals of preserving extant Indian treaties and affirming the supremacy of the central government, here, controlling the acquisition of new land by protecting only property rights acquired under those treaties, it relegated Indians to possessing mere occupancy rights without the legal capacity to convey land other than by treaty with the federal government.²⁵

In creating a fiction about conquest, Marshall, a former land speculator, contradicted his personal knowledge that tribes peacefully sold land to individuals and colonial governments.²⁶ He knew of,²⁷ yet ignored, dozens of international treaties signed by the United States (before that, by European colonizing nations) and Indian tribes.²⁸ Marshall's conquest myth, therefore, obscured the "gradual transfer" of sovereignty between nations, with all its "complexity, depth, and richness of detail,"²⁹ where "power did not shift from the vanquished to the conquerors in a neat package along with the acceptance of surrender."³⁰ Although Marshall

24. See Eisgruber, *supra* note 13, at 440 (quoting ROBERT KENNETH FAULKNER, *THE JURISPRUDENCE OF JOHN MARSHALL* 220 (1968)).

25. See Newton, *supra* note 18, at 209 ("The more the government's interest was characterized as an ownership interest, the more it became possible to regard the ownership of land alone as giving the government power to govern Indians.").

26. See Camden & Fort, *supra* note 3, at 92; see also Hermes, *supra* note 5, at 68 (describing early colonial history as replete with transfers of title from Indians to settlers, reflecting early English colonists' preference "for purchase over warfare," and saying that after King Phillips War between Wampanoag and English "ended Algonquian jurisdiction autonomy of all kinds" in New England colonies, consent, as means of gaining land disappeared, and was replaced by a story of complete annihilation and conquest, "building a foundation for the myth that European governance over all aspects of colonial life flowed directly from conquest").

27. Marshall had an active political life in Virginia, serving as a member of the Virginia House of Delegates, among other posts, and was a member of the House of Representatives as well as President Adams' Secretary of State before joining the Supreme Court as its Chief Justice in 1801. *Marshall, John, (1755 – 1835)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000157> (last visited Oct. 6, 2010). As a result of these elected positions and appointments, Marshall would have been well aware of many of these treaties as well as of the history of treaty negotiations with Indian tribes.

28. There were approximately 175 treaties negotiated between Britain and the British colonies from 1607 (with the Powhatan nation in Virginia) to 1775 (between the Iroquois of Ohio, the Shawnee, and Delaware and the colony of Virginia), responding to the political, military, and economic needs of European colonists and various tribes. Wilkins, *supra* note 19, at 292 (citing Dorothy Jones, *British Colonial Indian Treaties*, in 4 HISTORY OF INDIAN-WHITE RELATIONS 185-94 (Wilcomb E. Washburn ed., 1988)).

29. See Hermes, *supra* note 5, at 54; see also *id.* at 73 (saying "power drained slowly from the hands of the colonized. Conquest did not wrest the power to govern from their grasp").

30. See *id.* at 53, 55 (describing Marshall's "conquest narrative" as one which views colonial period where "immediate and total European dominance and Native American submission was the rule"); *id.* at 54 (describing complexity of how Europeans and Indian tribes actually exercised jurisdiction in Northeast and Mid-

later acknowledged in *Cherokee Nation* and *Worcester* that Indians *consented* to being governed through a series of federal treaties, his recantation created a “history of incomplete conquest,” which left Indian tribes as autonomous separate sovereigns capable of treating with the federal government, but unable to challenge federal authority. That history had to be further obscured in a political fiction that “Indians willingly gave up their land and conveniently died off.”³¹

Another way that Marshall denied the historical fact of Indian pre-discovery autonomy was to reduce “resistant Indian political entities to an assemblage of inferior, soon-to-be-extinct individuals”³²—in the words of *M’Intosh*, “fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest,”³³ in all ways unfit for life in a civilized world. This view of Indians provided additional support for Marshall’s premise that leaving Indians in possession of the country “was to leave the country a wilderness,”³⁴ which, in turn, justified finding superior title to Indian lands in the United States on the basis of discovery alone.³⁵ Marshall continued this debasement of Indians, reducing them to a childlike status in *Cherokee Nation*, the second opinion in his Trilogy, by describing

Atlantic regions for two centuries after discovery by Europeans and Indian tribes reflected “the fragmentation and reformation of sovereignty”).

31. See Konkle, *supra* note 22, at 462-64.

32. See *id.* at 459 (“Chief Justice John Marshall demonstrate[s] that legitimate control of land in North America requires both the recognition and the denial of Native political autonomy.”).

33. See *Johnson v. M’Intosh*, 21 U.S. 543, 590 (1823). Marshall’s view of Indians as savages was shared by other members of his court. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 21-22, 27-28 (1831) (Johnson, J., dissenting):

Their condition is something like that of the Israelites, when inhabiting the deserts. . . . I think it very clear that the constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes; an anomaly . . . which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state.

Cherokee Nation, 30 U.S. at 27-28 (Johnson, J., dissenting). Politicians at “the highest levels of government,” including President Andrew Jackson, shared Marshall’s depiction of Indians as savages and later in *Cherokee Nation*, as “wards” and “in a state of pupillage.” *Cherokee Nation*, 30 U.S. at 27; see also Konkle, *supra* note 22, at 473. It also corresponded to James Fenimore Cooper’s novel, *The Pioneers*, which was published in 1823, the same year as *M’Intosh*, and “popularized the fiction of the ‘vanishing Indian’ and open wilderness to the west.” See Camden & Fort, *supra* note 3, at 79; see also *id.* at 78 (“Cooper’s work, understood as both fiction and memoir, gives life to the same legal fictions used by Justice Marshall to dispossess all tribes of title to their land.”).

34. See *M’Intosh*, 21 U.S. at 590 (“To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.”).

35. See BARSH & HENDERSON, *supra* note 17, at 49.

them as being in a “state of pupilage,” and their relationship to the United States like that of a “ward to his guardian.”³⁶

Yet, Marshall would have known about the role Indians played in helping early settlers in the Massachusetts Bay and Virginia colonies. As a contemporary of Benjamin Franklin and George Washington, he would have been familiar with Franklin’s admiration for the Iroquois³⁷ and Washington’s for the Cherokee.³⁸ Marshall also would have known the role the Haudenosaunee’s (the Iroquois Confederacy) form of government played in influencing the drafters of the Constitution.³⁹ Indeed, Marshall’s use in *M’Intosh* of the adjective “savages” to describe the highly civilized and acculturated Cherokee Nation that next appeared before him, could not have been further from the truth.⁴⁰

When Marshall wrote his opinion in *Cherokee Nation*, the second case in the Trilogy, the political scene in the country had changed dramatically. The country was experiencing a revival of democratic (Populist), agrarian, and states’ rights thinking, which culminated in Andrew Jackson’s ascendance to the White House and the defeat of John Quincy Adams in 1828. Adams was a leading advocate of Marshall’s party, the Federalists. There was growing public distrust of the central government

36. See *Cherokee Nation*, 30 U.S. at 17.

37. Indeed Franklin’s infatuation with the Iroquois Confederacy led him to remark that he found it a “very strange thing, if six Nations of ignorant Savages should be capable of forming a Scheme for such an union . . . and yet that a like Union should be impracticable for ten or a Dozen English Colonies, to whom it is more necessary, and must be more advantageous.” Robert J. Miller, *American Indian Influence on the United States Constitution and Its Framers*, 18 AM. INDIAN L. REV. 133, 147 (1993).

38. See *id.* at 143 (describing Iroquois Great Law of Peace); see also Babcock, *supra* note 2, at 535-36 (describing Iroquois system of governance).

39. See DONALD A. GRINDE, JR., *THE IROQUOIS AND THE FOUNDING OF THE AMERICAN NATION* (1977); BRUCE E. JOHANSEN, *FORGOTTEN FOUNDERS: BENJAMIN FRANKLIN, THE IROQUOIS AND THE RATIONALE FOR THE AMERICAN REVOLUTION* (1982); Miller, *supra* note 37, at 133 (describing role of Indians in shaping Constitution and influencing Jefferson, Wilson, and Franklin and American life in general, and stating many Framers learned about Indian culture through service as Indian commissioners and as Indian treaty negotiators); Miller, *supra* note 37, at 142 n.60 (“There is some historical evidence that knowledge of the league influenced the colonies in their first efforts to form a confederacy and later to write a constitution.” (quoting CLARK WISSLER, *INDIANS OF THE UNITED STATES: FOUR CENTURIES OF THEIR HISTORY AND CULTURE* 128 (1940))).

40. See generally Walter H. Conser, Jr., *John Ross and the Cherokee Resistance Campaign, 1833-38*, 44 J. SOUTHERN HIST. 191 (1978) (describing sophisticated, non-military campaign of resistance that Cherokee mounted to avert their removal from their traditional lands and noting that Cherokee Nation’s written constitution did not include delegated power to make war; instead most interpersonal conflicts were resolved by consensual agreement). But see FULLER, *supra* note 4, at 65 (“In order to understand, a certain degree of intellectual stability is needful, and stability cannot be obtained except at the sacrifice of truth. Truth is in a state of perpetual oscillation; its mobility, its variety is disconcerting. We cannot grasp it without falsifying it.” (quoting PIERRE DE TOURTOULON, *PHILOSOPHY IN THE DEVELOPMENT OF LAW* 395 (1922))).

and the idea of a national economy, each of which the Federalists had promoted, and increasing anger directed at the post-war nationalistic decisions of the Marshall Court.⁴¹ Marshall confronted a state (Georgia) openly hostile to the Cherokee Nation⁴² and an increasingly popular President, Andrew Jackson, who was unsympathetic to the cause of Indian sovereignty.⁴³

In *Cherokee Nation*, the Cherokee had tried to invoke the Court's original jurisdiction to enjoin Georgia from enforcing its laws on land reserved to the tribe under a treaty with the federal government.⁴⁴ Marshall maintained that the Cherokee Nation had no standing to invoke the original

41. See, e.g., *Worcester v. Georgia*, 31 U.S. 515 (1832); *Osborn v. Bank of the United States*, 22 U.S. 738 (1824) (holding that Bank of United States' articles of incorporation, enabling it to sue in federal court, were consistent with Constitution, and Ohio's state law imposing tax on Bank was unconstitutional); *Green v. Biddle*, 21 U.S. 1 (1823) (holding states have no power to impair obligations incurred under Virginia-Kentucky compact); *McCulloch v. Maryland*, 17 U.S. 316 (1819) (holding Maryland's tax imposed on all uncharted banks within state of Maryland, including Bank of the United States, unconstitutional because states have no power to burden operations of constitutional laws enacted by Congress); *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) (holding that Supreme Court's appellate power extends to cases pending in state courts and Judiciary Act § 25, authorizing exercise of this jurisdiction, constitutional); *New Jersey v. Wilson*, 11 U.S. 164 (1812) (holding Act of 1804 unconstitutional). *Wilson*, *Biddle*, and *Worcester* were "unenforceable and were successfully resisted or ignored by the states." See RICHARD BEEMAN ET AL., *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN IDENTITY* 307-08 (1987) (saying that "[t]hese [unpopular] decisions also [provoked] a series of [very popular, although] unsuccessful, [efforts to amend] the Constitution . . . to limit the powers of the federal judiciary").

42. See Norgren, *supra* note 22, at 67 (describing how Georgia passed laws nullifying Cherokee laws, redistributing Cherokee land to white settlers, making "Cherokees second class citizens of color," and providing for the arrest of "any Cherokee official who tried to convene a meeting of the Cherokee government [or] any American living among the Cherokee who did not first swear an oath of allegiance to Georgia and its laws"); see also *id.* at 70-71 (describing how "[t]he Cherokee fought back in local Georgia courts" by appealing *Worcester v. Georgia*, 31 U.S. 515 (1832), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *State v. Corn Tassel*, 1 Dud. 229 (Ga. 1830) to the U.S. Supreme Court). The three cases collectively came to be known as the "Cherokee cases," even though no opinion was issued by Marshall in *Corn Tassel*.

43. See WILLIAM G. McLOUGHLIN, *CHEROKEE RENAISSANCE IN THE NEW REPUBLIC* 424-60 (1986) (describing President Jackson's efforts to remove Indians from their lands). Congress also favored removal of Indians from their homelands. See Indian Removal Act of 1830, 4 Stat. 411, 412 (1830).

44. Showing their political acumen, the Cherokee selected two prominent litigators to represent them, former United States Attorney General William Wirt and former Congressman John Sergeant, a wealthy Philadelphia lawyer, who also opposed President Jackson's policies. See Norgren, *supra* note 22, at 69. The case involved the arrest of George Corn Tassels, a Cherokee tribal leader, for the murder of another Cherokee on the reservation. In response to the Court's writ of error, Georgia promptly executed Tassels. Showing its further defiance of the Court, Georgia did not appear before the Court for oral argument and refused to acknowledge any legal papers served on it. See Norgren, *supra* note 22, at 72. Although the Court eventually denied the request for an injunction on the jurisdictional ground noted in the text, Marshall wrote, "[i]f Courts were permitted to

jurisdiction of the Court because it was neither a state nor a foreign nation:

Though the Indians are acknowledged to have an unquestionable, and, heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated *domestic dependent nations*. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a *ward to his guardian*.⁴⁵

Justice Johnson, in an eloquent and historically supported dissent, argued in response that the Cherokee had always had the trappings of a foreign nation, illustrated by among other things the continuing practice of the United States separately treating with them.⁴⁶ It is in *Cherokee Nation* that Marshall coined the phrases that have haunted Indian jurisprudence to this day—namely, that tribes can be thought of as “domestic dependent nations,” and that they are “in a state of pupillage[; t]heir relation to the United States resembles that of a ward to his guardian.”

Yet Marshall would have known that these descriptive phrases were untrue. Indeed, Marshall later acknowledged in *Worcester*, the last opinion in his Trilogy, that the words *treaty* and *nation* “are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.”⁴⁷ Marshall would have

indulge their sympathies, a case better calculated to excite them can scarcely be imagined.” *Cherokee Nation*, 30 U.S. at 15.

45. *Cherokee Nation*, 30 U.S. at 17 (emphasis added). Justices Story and Thompson dissented, arguing that “the Cherokees compose a foreign state within the sense and meaning of the constitution, and constitute a competent party [to] maintain a suit against the state of Georgia.” *Id.* at 80. Marshall persuaded Justices Story and Thompson to include their dissent as part of the official Court record to ensure a more balanced public record of the case. See Norgren, *supra* note 22, at 74-75. Justice Thompson, a northerner, was a former legal apprentice to New York State jurist and legal scholar James Kent, who was well known for his support of Indian land rights. *Id.* What is also interesting about the case is that Marshall’s opinion was only four pages long. The concurring opinions of Justices Johnson and Baldwin collectively ran twenty-eight pages and filled in a lot of the detail missing from Marshall’s opinion. The dissenters’ opinion covered twenty pages.

46. See *Cherokee Nation*, 30 U.S. at 80 (“[T]he Cherokees compose a foreign state within the sense and meaning of the constitution, and constitute a competent party [to] maintain a suit against the state of Georgia.”).

47. See *Worcester v. Georgia*, 31 U.S. 515, 517-20 (1832).

been familiar with the record of Indian treaty negotiations, ratifications, and proclamations, as well as with the language of these treaties. This record referred to tribes alternatively as nations and tribes, belying their status as “domestic dependent nations” or as a ward of the United States government, and confirming their separate political station in our nation’s history.⁴⁸

In *Worcester*, the third case in the Trilogy, Marshall tried to correct the fictitious historical record about the discovery doctrine and conquest, the nature of Indians, and the sovereign status of Indian tribes he had set out in his two earlier opinions.⁴⁹ In the process, he abandoned or significantly modified the legal doctrines on which they rested.⁵⁰ He repudiated his version of the discovery doctrine in *M’Intosh*, acknowledging that the doctrine was unrelated to conquest or ownership of property—saying the notion that European discovery and settlement constituted conquest or conferred title to property under European common law was “extravagant and absurd.”⁵¹ Directly renouncing *M’Intosh*’s conquest theory, Marshall now wrote that the American experience with Indians had been “a continuous process of negotiation, alliances, reconciliation, and solicitude which had always respected tribal political integrity.”⁵²

48. See Wilkins, *supra* note 19, at 307; see also THE WRITINGS OF THOMAS JEFFERSON 328-29 (Albert Ellery Bergh ed., 1904).

I consider our right of preemption of the Indian lands, not as amounting to any dominion, or jurisdiction, or paramountship whatever, but merely in the nature of a remainder after the extinguishment of a present right, which gave us no present right whatever, but of preventing other nations from taking possession, and so defeating our expectancy: *that the Indians had the full, undivided and independent sovereignty as long as they choose to keep it, and that this might be forever.*

Id. (emphasis added).

49. *Worcester* involved the arrest of several missionaries who violated Georgia law when they failed to get licenses from the governor authorizing them to live in Cherokee country. The Court overturned the convictions, finding Georgia’s laws to be “repugnant to the constitution, treaties, and laws of the United States” and held that Georgia law had no force on land that had been preserved for the Cherokee under a treaty with the United States. The Governor of Georgia threatened to hang the missionaries, if the Georgia Superior Court responded to the Supreme Court’s mandate by freeing them. See Norgren, *supra* note 22, at 79-81. The Court adjourned without issuing a new decree authorizing the federal marshals to free the missionaries, and thus barely escaped what might have been a constitutional crisis. See Joseph C. Burke, *The Cherokee Cases: A Study of Law, Politics, and Morality*, 21 STAN. L. REV. 500, 525 (1969).

50. Ironically, much of what Marshall wrote in *Worcester* had earlier been noted by Justice Johnson in his dissenting opinion in *Cherokee Nation*.

51. *Worcester*, 31 U.S. at 543-46 (describing European colonial charters as “grants assert[ing] a title against Europeans only . . . [that] were considered as blank paper so far as the rights of the natives were concerned”).

52. See *id.* at 542-56; see also *Mitchel v. United States*, 34 U.S. 711, 749, 754 (1835) (“By thus holding treaties with these Indians, accepting cessions from them with reservations, and establishing boundaries with them, the king waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve”); *id.* at 754

Marshall also tried to lessen the sting of his phrase “domestic dependent nation,” stating that “Indian nations ha[ve] always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil”⁵³ In a complete reversal of *Cherokee Nation*, Marshall made it clear that the tribes’ relationship to the federal government was governed by consent, not by any guardian-ward relationship or subordination arising out of the nature of Indians or their primitive condition.⁵⁴ Although *Worcester* contradicted Marshall’s characterization of tribes in *Cherokee Nation* as inferior and unable to govern themselves, it left intact the ultimate supremacy of the federal government in tribal matters.

Even though the Cherokee Nation finally won in the Supreme Court, it was too late for them⁵⁵ and for the larger cause of tribal sovereignty—the horses were out of the barn, as it were, and could not be put back in. The fictions that interlace the first two opinions have endured; they have become fact and are permanently woven into federal Indian law jurisprudence. The doctrines they spawned—discovery, plenary power, federal trust, and preemption⁵⁶—have contributed to the dismembering of tribal sovereignty by later courts.⁵⁷ Perhaps because, in *Worcester*, Marshall never directly overruled his earlier views of Indians as fierce savages without natural rights (*M’Intosh*) who were too weak to survive without the protection of the federal government (*Cherokee Nation*), subsequent courts could use

(explaining that because United States had continued Great Britain, France, and Spain’s policies of entering into treaties with tribes, and thus renounced its right of conquest, it could not now assume that right).

53. See *Worcester*, 31 U.S. at 551-56; see also *id.* at 542-43 (“America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.”).

54. See *id.* at 559 (“The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.”).

55. See generally FRANCIS P. PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 191-242* (1984) (describing federal government’s removal policy and its impact on southern tribes, Cherokee in particular); see also McLOUGHLIN, *supra* note 43, at 411-47 (describing events leading up to removal of Cherokee from their lands).

56. For a more detailed discussion of these doctrines and their impact on tribal sovereignty, see Babcock, *supra* note 2, at 497-501.

57. Because *Worcester* recognized some measure of tribal sovereignty, many Indian legal scholars consider it to be among the few high-water marks in Indian law, although others note that the Court has been determinedly backing away from it ever since. Compare David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1582 (1996) (saying, “*Worcester* lays the cornerstone for the legal system’s continuing recognition of tribal sovereignty”), with Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 9-10 (1991) (describing *Worcester* as high-water mark in federal Indian law, from which Supreme Court has been determinedly “back-tracking,” as has Congress).

language from his first two opinions to justify infringing upon tribal sovereignty and ignore his later changes to those perceptions in *Worcester*.⁵⁸

With this as background, the Article turns to the legal fiction doctrine⁵⁹ to provide a frame of reference for analyzing how Marshall used the doctrine in the first two opinions of his Trilogy.

III. LEGAL FICTIONS AND MARSHALL'S USE OF THEM

Because legal fictions can perform some practical functions for judges,⁶⁰ their use by judges like Marshall, including as a basis for legal doctrine, is not unusual.⁶¹ For example, a judge may "introduce new law in the guise of old" law because people assimilate facts that are unfamiliar to them by associating them with facts that they already know.⁶² This use of a legal fiction allows the judge to adjust old rules to new facts to soften

58. Eisgruber explains that Marshall rarely cited precedent in his opinions because he believed citing to prior opinions, especially if they were controversial, was an ineffective way of persuading his readers that his controversial interpretations of the Constitution were "likely to produce good government." Eisgruber, *supra* note 13, at 465. Even worse, "adhering to bad precedents would entrench bad government." *Id.* In this regard, Eisgruber distinguishes Marshall from modern Justices who "use 'binding' precedents to prove that they are not themselves exercising judgment at all, Marshall's ambition was to prove that the Court was not only exercising judgment but doing it well." *Id.* at 465-66. Here, where Marshall was trying to extricate himself from the bad judgments he made in his two earlier opinions, but let the holdings stand, he would not want to invite readers to reread those opinions, by referencing them, and to be led into wondering about the contradictions between them and his current opinion. One way to do that was not to mention them at all.

59. On the topic of the application of the legal fiction doctrine to the public trust doctrine, see Hope M. Babcock, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. REV. 393 (2009).

60. See FULLER, *supra* note 4, at 3 (saying fictions are "highly beneficial and useful" (quoting BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 43 (Lewis ed., 1897))).

61. See Peter Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1439-40 (2007) (saying courts frequently use legal fictions and base legal doctrine on "false, debatable, or untested premises"); *id.* at 1441 ("A court deploys a new legal fiction when (1) the court offers an ostensible factual supposition as a ground for creating a legal rule or modifying, or refusing to modify, an existing legal rule; and (2) the factual supposition is descriptively inaccurate."); see also Mark H. Aultman, *Legal Fiction Becomes Legal Fantasy*, 7 J. LEGAL PROF. 31, 32 (1982) (calling legal fictions "genetic mutations of legal developments"). But see FULLER, *supra* note 4, at 5 (wondering whether when he uses "the word 'fiction'" he means "anything more than 'bad reasoning'?").

62. See FULLER, *supra* note 4, at 65 (saying "[p]erhaps the greatest of these limitations [on the human mind] consists of the fact that human reason must always proceed by assimilating that which is unfamiliar to that which is already known. . . . We are forced to deal with new problems in terms of an existing conceptual apparatus which in the nature of things can never be entirely adequate for the future."). Fuller says that the use of a legal fiction for this purpose also satisfies the judge's own desire "for a feeling of conservatism and certainty." See *id.* at 58.

what otherwise might be perceived of as a sudden legal change.⁶³ Thus, Marshall may have put forth his radically revised version of the discovery doctrine as though it was centuries old, in an attempt to convince the public that he was “merely applying an existing law.”⁶⁴ Similarly, Marshall’s conquest myth enabled him to sanction the legal transfer of title from Indians to non-Indians by forcing the facts of the case into a familiar principle of law, the discovery doctrine, instead of creating an entirely new category of property law to cover those often ephemeral exchanges.⁶⁵

Legal fictions are “a type of storytelling where the fiction is created to make a smooth rule of law.”⁶⁶ Marshall used legal fictions in *M’Intosh* to smooth the creation of a new rule of law, which established a legal basis for divesting Indians of what might otherwise be perceived of as a property right to their land. He may have also resorted to the device of a legal fiction because he was unable to explain the case’s holdings in “non-fictional terms.”⁶⁷ Calabresi suggests that judges often resort to legal fictions “to cope with ‘tragic choices’ or to ‘keep us from expanding too far those narrow exceptions to our constitutional aspirations which we simply cannot avoid making.’”⁶⁸ Marshall’s later renunciation of the legal fictions he used in *M’Intosh* and *Cherokee Nation* implies that he was faced with just such a tragic choice in the earlier cases—namely, a choice between the fate of the new republic and the cause of Indian sovereignty.

63. See Smith, *supra* note 61, at 1436 (noting that prior to statutory law era, judges frequently “relied on legal fictions to mask the effects of legal change,” especially “to avoid changing a legal rule that required a particular factual predicate for its application” where factual assertions triggering common law rules were “plainly . . . false”); see also FULLER, *supra* note 4, at 21-22 (calling legal fictions “the growing pains of the language of the law”); FULLER, *supra* note 4, at 2 (“The fiction has generally been something of which the law ought to be ashamed, and yet with which the law, cannot, as yet, dispense.”).

64. See FULLER, *supra* note 4, at 56-57 (discussing “motives for historical fiction,” asking “[w]hy do courts so frequently introduce new law in the guise of old,” and answering “a judge, fully conscious that he is changing the law, chooses, for reasons of policy, to deceive others into believing that he is merely applying existing law”).

65. See Camden & Fort, *supra* note 3, at 90 (explaining how doctrine was used to justify title passing from Indians to non-Indians); *id.* (quoting Justice Story as saying that discovery doctrine “was a ‘most flexible and convenient principle’”). The transitory nature of these exchanges is illustrated by the facts in *M’Intosh*, where Indian land had been sold to one grantee and then passed to the United States under the Treaty of Greenville for further patenting without any reservation of that prior title, indicating that the tribes in question considered the earlier title to have no particular validity. See *Johnson v. M’Intosh*, 21 U.S. 543, 594 (1823).

66. See Camden & Fort, *supra* note 3, at 85.

67. See FULLER, *supra* note 4, at 64.

68. See Smith, *supra* note 61, at 1470 (quoting GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 60 (1985); GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 26, 78, 195-96 (1978); CALABRESI, IDEALS, *supra*, at 61, respectively); see also FULLER, *supra* note 4, at 94 (“[W]e easily forget that the fiction is by no means so transparent to the man who resorts to it in his struggle to solve an embarrassing problem. To him, the fiction often seems, not simply the easiest way out of his difficulties, but the only way out.”).

According to Felix Cohen, legal fictions can also “impress the imagination and memory where more exact discourse would leave minds cold.”⁶⁹ Marshall’s story about wild savages who lived in the forests and were eventually conquered by brave settlers was exciting and conformed to the popular image of Indians at that time.⁷⁰ As a result, his story not only resonated with those harboring federalist ambitions, but was also sure to find a sympathetic public audience;⁷¹ engendering popular support for the Court.

Legal fictions allow a judge to “short-circuit attempts to comprehend the complexity behind the assumptions a legal fiction conveys.”⁷² According to Lon Fuller, this may explain why so “[f]ew of [our metaphorical fictions] are completely dead”; they “stimulate the human penchant for simplicity.”⁷³ In Marshall’s case, the complexity lay in the history he was dealing with: “[i]nstead of concocting elaborate proofs for contestable propositions, Marshall sought to put his readers in the right frame of mind to make the relevant judgments themselves.”⁷⁴ By simplifying the story of Indian title into a story of conquest and fierce savages, Marshall avoided having to deal with the complexity of how North America was actually settled and of early relations between colonists and Indian tribes.⁷⁵ Had he dealt with this record accurately, he would not have been able to reach the “good” result he wanted; Indians could have treated for and sold land as they wished and continued to function as a competing source of power that threatened the Federalist agenda.⁷⁶

69. See Cohen, *supra* note 1, at 812; see also FULLER, *supra* note 4, at 24 (saying that “the desire to keep the law persuasive” leads to a “tendency” to use metaphor, which “is the traditional device of persuasion. Eliminate metaphor from the law and you have reduced its power to convince and convert.”); FULLER, *supra* note 4, at 10 (“A fiction is frequently a metaphorical way of expressing a truth. . . . The truth of a statement is, then a question of degree.”).

70. See Camden & Fort, *supra* note 3, at 96 (saying Cooper’s depiction of “the ‘vanishing Indian’” is “typical of representations of Native Americans in the novels of this period,” which were used to “erase[] white guilt over Indian removal”).

71. See Saul P. Levmore, *Fables, Sagas, and Laws*, 33 WILLAMETTE L. REV. 485, 486 (1997) (saying “stories survive if they resonate with audiences”).

72. See Aviam Soifer, *Revealing Legal Fictions*, 20 GA. L. REV. 871, 877 (1986), quoted in Camden & Fort, *supra* note 3, at 91; see also Soifer, *supra*, at 871, quoted in Camden & Fort, *supra* note 3, at 77 (“If accepted, a legal fiction channels thought, and, like sunlight, legal fictions affect how far the growth will tilt.”).

73. See FULLER, *supra* note 4, at 116. One way this disposition manifests itself is through the device of analogies. See *id.* at 115 (“[R]easoning by analogy” need not “necessarily involve an alteration or distortion of reality . . . in practice it *generally* does. The congenital predisposition toward simplicity of the human mind leads us to give too much credence to our analogies.”); *id.* at 113 (saying that “human thought must always proceed by analogy,” and that “analogies must always be taken from the existing stock of experience”).

74. See Eisgruber, *supra* note 13, at 448.

75. See generally Hermes, *supra* note 5 (describing complexity of Indian and non-Indian relations during colonial period).

76. In describing Marshall’s approach in *Marbury v. Madison*, 5 U.S. 137 (1803), Eisgruber explains that Marshall justified judicial review by first establish-

Legal fictions are frequently “used to ground and justify legal doctrine,” regardless of the accuracy of the underlying explanation.⁷⁷ They also enable judges “to reconcile a specific legal result with some premise or postulate.”⁷⁸ In *M’Intosh*, Marshall had to reconcile a legal result that left title to Indian lands in the hands of the federal government for further disposition with the premise that Indians had the natural right to the soil they occupied and retained their full sovereignty. One way for Marshall to do this was to invent the dual fictions of conquest and uncivilized, savage Indians. The use of these fictions enabled him “to escape the consequences of an existing, specific rule of law,”⁷⁹ which would have left Indians in possession of their land and would have threatened federal sovereignty over those lands and potentially any non-Indian who sought to settle on them.⁸⁰ He thus was able to ground and justify the central government’s supremacy over the new nation’s land base by explicating the problems that would arise from a contrary result.⁸¹

Maintaining legal fictions may be important where they are perceived as necessary for the preservation of the political and legal order.⁸² Marshall, slightly more than a generation from the founding, had to address as first principles “the legitimacy of American law” and of the Supreme Court “to speak for the American people.”⁸³ In relatively short order, he not only had to demonstrate that the Court’s “decisions were right, but that their decisions were law.”⁸⁴ Additionally, as a supporter of the Federalist

ing it as a premise and then restricting its use to only those situations where its use produced “good results.” Eisgruber, *supra* note 13, at 454.

77. Smith, *supra* note 61, at 1471-72.

78. FULLER, *supra* note 4, at 51; *id.* at 53 (saying to understand “any particular fiction we must first inquire: What premise does it assume? With what proposition is it seeking to reconcile the decision at hand?”).

79. *Id.* at 53.

80. According to Eisgruber, Marshall “demanded that [his] readers consider the needs of the new nation in light of [the political] . . . crisis” that led to the framing and ratification of the Constitution. Eisgruber, *supra* note 13, at 448.

81. Eisgruber explains that this was the approach Marshall took in *McCulloch v. Maryland*, 17 U.S. 316 (1819), where he justified a broad construction of the national government’s powers to surmount obstacles that might lie in the way of achieving a particular constitutional purpose, upon which the happiness of the nation depended. See Eisgruber, *supra* note 13, at 449-50.

82. See Smith, *supra* note 61, at 1491 n.272 (“As scientists, we consider it our purpose to destroy myths. But we should recognize that the ‘myths of democracy’ may be essential to . . . stable political order” (quoting Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the “Nobel” Lie*, 74 VA. L. REV. 179, 185-86 (1988))).

83. See Eisgruber, *supra* note 13 at 440-41; *id.* at 442-43 (explaining creation of written, “definitive constitution” as vehicle to make “the concept of law applicable to the American nation,” and describing creation as “alarming” in that it replaced, but did not completely oust, “the postconstitutional authority and content of previously honored common law rules”). Eisgruber contrasts Marshall’s predicament with that facing modern jurists whose principle concern about judicial activism is whether it “produces bad results or is antidemocratic.” See *id.* at 444.

84. *Id.* at 445.

Party and its advocacy of a strong central government, he was also motivated by a desire to solidify his party's control over the reins of government and thus assure the continuation of his Court's authority to interpret and apply the Constitution.⁸⁵ He feared what would happen to both institutions if Jackson's Democratic Party gained control.⁸⁶

The use of legal fictions, however, can be problematic.⁸⁷ Because legal fictions, like Marshall's, are based on false assumptions and fictive factual recitations, "they cannot be said to offer plausible public justifications for judicial action."⁸⁸ A judge who adopts a legal fiction is generally aware that it is false; certainly Marshall knew that the fictions he used in *M'Intosh* and *Cherokee Nation* were not true⁸⁹—indeed, he acknowledged as much in *Worcester*. However, if the judge believes the legal fiction, as later courts appeared to believe Marshall's, then it can become dangerous;⁹⁰ the fiction is only safe "when it is used with a complete consciousness of its falsity."⁹¹ Over time, "a fiction starts as a pretense . . . [and] may, through a process of linguistic development, end as a 'fact'."⁹² When courts so often repeat legal fictions, as they have with Marshall's, then the factual distortions become institutionalized; a part of federal Indian law jurisprudence that cannot be denied.⁹³ Over time, this is exactly what has happened to Marshall's legal fictions. Indeed, "the fiction of the doctrine of discovery

85. See *id.* at 447, 480 (explaining how Marshall's preoccupation with convincing American public that national institutions, judiciary included, could govern, led him to decide cases based on his view of "whatever allocation of political authority would best serve justice").

86. Given the disputed election of 1824, in which Jackson won the popular vote, but lost in the House of Representatives, having failed to win a majority in the Electoral College, this fear was not unfounded. See John Mack Faragher, *Jackson, Andrew (1767-1845)*, in THE AMERICAN HERITAGE ENCYCLOPEDIA OF AMERICAN HISTORY 462 (John Mack Faragher ed., 1980).

87. See Aultman, *supra* note 61, at 31 (saying while "[t]here is utility" in "a mental process," in which "lawyers act as if words were true because it is obvious that other words which might serve as precedent will not permit the achievement of desired objectives. . . . [But] there is also danger. Legal fiction can easily reach the point of legal fantasy."); see also Smith, *supra* note 61, at 1481 (arguing that "judicial candor presumptively is desirable").

88. Smith, *supra* note 61, at 1485.

89. See FULLER, *supra* note 4, at 7 (saying "[a] fiction is generally distinguished from an erroneous conclusion (or in scientific fields, from a false hypothesis) by the fact that it is adopted by its author with knowledge of its falsity. A fiction is an 'expedient, but consciously false, assumption.'").

90. See *id.* at 9-10; *id.* at 6 ("[A] fiction is distinguished from a lie by the fact that it is not intended to deceive"); see also Aultman, *supra* note 61, at 32 (saying whether something "is legal fiction or legal fantasy depends not on the truth of the statement 'in itself,' but upon what one intends to do with it—whom one intends to fool by it").

91. FULLER, *supra* note 4, at 10.

92. *Id.* at 77; see also Camden & Fort, *supra* note 3, at 86 (referring to this transformation of fiction into fact as "slippage").

93. See FULLER, *supra* note 4, at 79 ("When this process of fact distortion becomes 'institutional,' when it is so often repeated as to furnish a substantial basis for predicting court action, then it becomes a matter of concern for the student of

and conquest became fact troublesomely fast.”⁹⁴ So did Marshall’s fictional view of Indians as wild savages who would leave the land a wilderness, if it was left in their custody. They both continue “to haunt Indian law today,”⁹⁵ as discussed in greater detail in Part IV of this Article.

Legal fictions are of greater concern when the Supreme Court relies on them, as they have repeatedly with Marshall’s Indian law fictions. This is so “because the Court’s decisions tend, by virtue of the Court’s institutional role, to carry substantive and methodological implications for judicial decisionmaking at all other levels.”⁹⁶

Fuller warns that what he calls “simplificatory falsifications of reality” can also be “highly dangerous,” if future judges use them for different purposes than originally intended.⁹⁷ Marshall deployed his legal fictions for the sole purposes of strengthening the central government and assuring the public it had nothing to fear from the Court.⁹⁸ However, their use by subsequent courts has had nothing to do with those purposes; rather, their later use appears intended solely for the purpose of diminishing tribal sovereignty, especially when in conflict with a state’s interests.⁹⁹ Fuller warns that “when a single step in a process of reasoning is removed from its corrective background and given a value on its own account,” it can be an “intellectual disaster”; it may also be extremely dangerous.¹⁰⁰ To the extent that Marshall’s fictions, as bad as they were when first propounded, were grounded in his federalist ambitions and had little to do with the reality of the world he was writing about, their extraction from the Trilogy and subsequent use by later courts in entirely different contexts was “even more vicious”¹⁰¹—Fuller’s words.

Fuller suggests that “[i]t is easy to conclude uncharitably that the judge who enlarges his jurisdiction or who changes a rule of law under cover of a fiction is very coolly and calculatingly choosing to hide from the public the fact that he is legislating.”¹⁰² Because legal fictions “purport to

legal phenomena,” and, under those circumstances, “it is possible that we have an institutional tendency to fact distortion”).

94. Camden & Fort, *supra* note 3, at 91.

95. *Id.* at 108.

96. See Smith, *supra* note 61, at 1465; see also *id.* (“To the extent that new legal fictions are dangerous or at least problematic . . . such ripple effects are also likely to be undesirable.”).

97. FULLER, *supra* note 4, at 107.

98. Eisgruber cites *Marbury v. Madison* as an example where Marshall deflected republican opponents of the Court by showing that the Court’s “willingness to impose constitutional limits on its own powers made it appear a more trustworthy exponent of the power it claimed.” See Eisgruber, *supra* note 13, at 446.

99. See Babcock, *supra* note 2, at 503-09 (discussing erosion of tribal sovereignty as resulting from exercise of state authority).

100. FULLER, *supra* note 4, at 119.

101. *Id.* at 120 (saying things become “even more vicious when the isolated element is given a value on its own account and is used as a point of departure for other reasoning processes”).

102. *Id.* at 7.

turn on mere matters of fact,” they “obscure the very fact that a normative judgment is required”¹⁰³ in the articulation of some legal rule—something that judges are reluctant to admit to publicly.¹⁰⁴ In *M’Intosh* and *Cherokee Nation*, Marshall appears to be both “legislating” the creation of, and making normative choices about, a new social order that excluded Indians as full partners. But, perhaps Marshall thought that the need to legitimize “the politico-legal system”—here the plenary power of the Federalist Party and his Court—justified his lack of candor about the social cost of his normative judgments.¹⁰⁵

Marshall had no interest in considering an alternative version of history. The accuracy of his stories about conquest and the nature of Indians was much less important to him than the link that they enabled him to make between certain theoretical assumptions about the capacity of Indians to be productive property owners, let alone subservient to the federal government, and the need to remove Indian tribes from blocking the country’s western expansion.

His aim was to present evidence in support of his principal conclusions, which were that “all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate lands occupied by Indians,” and that the sovereigns of Europe had granted lands still in possession of Indians.¹⁰⁶

Thus, Marshall used legal fictions in *M’Intosh* and *Cherokee Nation* to tell a story he hoped would advance a Federalist agenda and bolster waning support for the Court in the political establishment as well as in the general public. They were used to justify the transfer of Indian land to non-Indians; to “induce conviction that a given legal result is just and proper.”¹⁰⁷ They were also used “to ground and justify” the legal doctrines he created about conquest and diminished tribal sovereignty, even

103. Smith, *supra* note 61, at 1485; *id.* at 1439 (saying “judges’ purported factual suppositions sometimes are devices, conscious or not, for concealing the fact that the judges are making normative choices in fashioning legal rules”).

104. *See id.* at 1469.

105. *See id.* at 1489 (suggesting legitimacy of politico-legal systems as justification to dispense with candor).

106. Camden & Fort, *supra* note 3, at 106 (quoting LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LAND* 103 (2005)).

107. FULLER, *supra* note 4, at 54 (describing “emotive legal fictions “which are “intended . . . to induce conviction that a given legal result is just and proper. We may therefore call emotive legal fictions ‘persuasive fictions,’ bearing always in mind that the author of the fiction may be as much influenced by its persuasive power as his audience.”).

though he knew the underlying factual predicates were fabricated.¹⁰⁸ If Marshall had not known his fictions were false, one might excuse him for what he did.¹⁰⁹ However, he did know, as his later opinion in *Worcester* demonstrates. Instead, he used the fictions to hide the fact that he was making normative choices about the fate of Indians in the new country in “the service of some *other* normative goal”¹¹⁰—the continuation of the Federalist agenda and a strong Supreme Court.¹¹¹

Although Marshall’s use of legal fictions was consistent with many of the reasons that find favor with some judges and scholars, their subsequent use by future courts illustrates what can happen when they are taken out of context and applied to achieve different purposes, as discussed in greater detail in the next part of the Article.

IV. MARSHALL’S USE OF THE LEGAL FICTION DOCTRINE DID GREAT HARM TO THE CAUSE OF TRIBAL SOVEREIGNTY AND TO INDIANS IN GENERAL

Although Marshall may have avoided a constitutional crisis in *Cherokee Nation* by deciding the case on purely jurisdictional grounds, thus cutting off further attack from states’ rights advocates,¹¹² he instead did long-lasting damage to the concept of tribal sovereignty. His designation of qualified nationhood for tribes, calling them “*domestic dependent nations*,” placed them outside the scope of the Court’s Article III jurisdiction.¹¹³ When coupled with his description in that case of Indians as being in a “state of pupilage,” and their relationship with the federal government as that of a

108. These doctrines later became the basis for the federal preemption, federal trust, and plenary power doctrines, all of which further eroded tribal sovereignty. See Babcock, *supra* note 2, at 497-509 (discussing these doctrines).

109. See FULLER, *supra* note 4, at 131. Fuller explains:

It is not always easy to distinguish between the process of discovering the facts of social life (descriptive science), and the process of establishing rules for the government of society (normative science). . . . Before one can intelligently determine what *should* be, one must determine what *is*, and in practice the two processes are often inseparably fused.

Id.

110. See Smith, *supra* note 61, at 1455-65, 1474 (referring to use of new legal fictions, such as the “rational economic actor,” the lack of salience of the defense “ignorance of the law, even though the public is often unaware of the law, and congressional intent and originalism as interpretative devices, as ways to “legitimate some aspect of the legal system or to operationalize a legal theory”); see also FULLER, *supra* note 4, at 131 (“Much of what appears to be strictly juristic and normative is in fact an expression, not of a rule for the conduct of human beings, but of an opinion concerning the structure of society.”).

111. Cf. Cohen, *supra* note 1, at 840 (“It is difficult for those who still conceive of morality in other-worldly terms to recognize that every case presents a moral question to the court.”).

112. See Norgren, *supra* note 22, at 75.

113. See Konkle, *supra* note 22, at 468 (emphasis added). Konkle notes that the phrase “domestic dependent nations” merely defined the “peculiar” relationship between the federal government and Indian nations and did not recognize that Indians were capable of establishing stable governments because that would imply “their future existence.” *Id.*

“ward to his guardian,”¹¹⁴ Marshall effectively undercut any notion of independent, fully sovereign tribes.¹¹⁵ Congress and later courts repeatedly used this language to diminish tribal sovereignty.¹¹⁶

The effect of Marshall’s version of the discovery doctrine, which led to the Congressional Plenary Power doctrine, has been especially devastating for Indian tribes.¹¹⁷ As Professor Robert Williams writes,

[t]oday, under Chief Justice Marshall’s opinion in *Johnson v. McIntosh*, Indian Nations find themselves operating within a legal system that denies them ultimate sovereignty and the right of self-determination in their lands. Under the Doctrine of Discovery, Congress retains ultimate sovereignty over Indian Nations, and can unilaterally strike down the exercise by tribes of even the most pedestrian forms of self-government.¹¹⁸

Similarly, Marshall’s view of Indians in *M’Intosh* as uncivilized savages has informed the content of federal Indian jurisprudence since he

114. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

115. See L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 810-11 & n.6 (1996) (saying “the conceptual basis” of the Plenary Power Doctrine and Federal Trust Doctrine, under which Congress has complete power over Indian tribes and acts as protectorate of tribal interests (respectively), “and its power both to benefit and bring harm the tribes . . . remains the same”); see also *United States v. Mazurie*, 419 U.S. 544, 553-54 (1975); *Mazurie*, 419 U.S. at 554 n.11 (“It is undisputed that the Wind River Tribes have not been emancipated from federal guardianship and control.”).

116. See FRANK POMMERSHEIM, *BRAID OF FEATHERS* 45 (1995) (commenting that in trust relationships, tribes function as practically voiceless dependent beneficiaries of federal largess, for better or worse); see also Gould, *supra* note 115, at 834 (saying that “over the course of more than 160 years after *Cherokee Nation* announced the relationship of guardian and ward [between the Federal Government and tribes], the only certainty about the congressional trust responsibility has been its continuing power to divest the tribes of sovereignty”); Gould, *supra* note 115, at 811-12 (citing Dawes Act and Congressional Termination Policy as most infamous examples of diminishing tribal sovereignty).

117. See Robert A. Williams, Jr., *Jefferson, the Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165, 168-69 (1987) (saying, among other things, that “[p]rinciples and rules derived from the Doctrine and its related notions of Congressional plenary power in Indian affairs have legitimated numerous injustices and violations of Indian human rights,” such as “uncompensated Congressional abrogations of Indian treaty rights, leading to takings of Indian lands and resources, involuntary sterilization of Indian women, violent suppression of traditional religions and governing structures, and all the other usual forms of genocide perpetrated upon Indian people by European-derived ‘civilization’ represent the historical detritus of this legal doctrine.”).

118. *Id.* at 191. See also POMMERSHEIM, *supra* note 116, at 51 (describing discovery doctrine as “constitutional hegemony developed without constitutional safeguards or limits”); Newton, *supra* note 18, at 209 (“[J]udicial misinterpretations of the [discovery] doctrine are in large part responsible for arguments in favor of virtually unreviewable federal power over Indian lands.”); Newton, *supra* note 18, at 209 (“The more the government’s interest [became] an ownership interest, the more it became possible to regard the ownership of land alone as giving the government power to govern Indians.”); see also Williams, *supra* note 117, at 169.

fabricated it.¹¹⁹ For example, in *Tee-Hit-Ton v. United States*,¹²⁰ the Court, citing *M'Intosh*, wrote that:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.¹²¹

The language and reasoning in *Oliphant v. Suquamish Tribe*,¹²² in which the Court held the arrest of two non-Indians on a reservation by tribal police an unwarranted assertion of tribal jurisdiction over the personal liberty of United States citizens, resonate with Marshall's earlier depictions of Indians as "savages."¹²³ In *United States v. Kagama*,¹²⁴ the Court, citing *Cherokee Nation*, described Indian tribes as "wards of the nation," who are "dependent on the United States . . . for their daily food" and "for their political rights," to justify its decision sustaining a law removing certain crimes from tribal jurisdiction.¹²⁵ Marshall's depiction of Indians in *M'Intosh* and *Cherokee Nation* also had political repercussions,

119. See Konkle, *supra* note 22, at 477 (explaining that "the parameters of our thinking about Native peoples and settlers are determined by the relations of 150 years ago and more").

120. 348 U.S. 272 (1955).

121. *Id.* at 289-90 (citing *Johnson v. M'Intosh*, 21 U.S. 543, 587 (1823)).

122. 435 U.S. 191 (1978). See also *Nevada v. Hicks*, 533 U.S. 353 (2001) (extending *Oliphant* to civil case, and holding that Navajo Nation lacked civil jurisdiction over non-Indian police officer accused of damaging property during his search of tribal member's house located on reservation).

123. See *Oliphant*, 435 U.S. at 210. The Court explained:

By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice" It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.

Id. See also BARSH & HENDERSON, *supra* note 17, at 49 (noting that Marshall's unfortunate analogy between tribal occupation of land and "medieval tenant farmers [who] occupied their lands at the sufferance of the 'lords of the fee,'" *M'Intosh*, 21 U.S. at 592, influenced not only the *Oliphant* Court, but all subsequent courts thinking about relationship between Indian tribes and the federal government).

124. 118 U.S. 375 (1886).

125. See *Kagama*, 118 U.S. at 383-84 (upholding Major Crimes Act, which federalized certain offenses committed by Indians, thus removing these crimes from tribal jurisdiction). The Court explained:

These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the trea-

providing a basis for the Dawes Act, tribal termination, and the removal of Indian children from their homes so that they might become acculturated in the ways of non-Indian society.¹²⁶

Marshall's stories about discovery and conquest as well as about Indians as warring and uncivilized savages have been "harmful" to Indians "both as law and as cultural understanding."¹²⁷ His fictions "supplied the leading edge of policymaking and public deliberation"¹²⁸ about the place of Indians in our society not only for Marshall's era, but also for the future, which is what makes them particularly pernicious. Why then have they endured?

V. WHY HAVE MARSHALL'S LEGAL FICTIONS PERSISTED?

Fuller frames the inquiry for the last part of this Article when he wonders why some fictions survive and others do not.¹²⁹ Marshall's fictions initially survived because they were consistent with the desires of a young, expansionist nation and resonated with the popular depiction of Indians at the time he propounded them. They also persisted because they worked in the near-term.¹³⁰ They succeeded in divesting tribes of their land, opening that land up to non-Indian settlement, and in removing tribes as a separate, autonomous source of competing power to the federal

ties in which it has been promised, there arises the duty of protection, and with it the power.

Id. at 384 (emphasis added).

126. For more information on these initiatives, see Babcock, *supra* note 2, at 492-97 and the sources cited therein. See Rebecca Claren, *Paddling Toward Shore: Northwestern Tribe Takes a New/Old Approach to Stemming the Native Health Care Crisis*, HIGH COUNTRY NEWS, May 18, 2009, at 6-7, available at <http://www.hcn.org/issues/41.9/paddling-toward-shore> (describing devastating effect of removing Suquamish Indian children from their reservation homes in attempt "to kill the Indian, not the man"). Cf. Chris Lehman, *Legal Fictions*, CAL. LAW., Sept. 2006, at 39 ("In most such cases, the law supplied the leading edge of policymaking and public deliberation," and saying "in the key realm of racial justice, it's no accident that *Brown* institutionalized the idea of desegregation a full ten years ahead of Congress's ratification of the Civil Rights Act.").

127. See Camden & Fort, *supra* note 3, at 83; see also Mezey, *supra* note 3, at 20 ("Marshall's opinion in *M'Intosh* is part of the myth-making about the American west, its cultural influence on a par with its legal force.").

128. Lehman, *supra* note 126, at 39.

129. FULLER, *supra* note 4, at 20 ("[W]hy, in the course of history, are some fictions discarded entirely, while others are redefined and retained as terms of description? . . . [And] which of these processes—rejection or redefinition—ought we to encourage?").

130. See Aultman, *supra* note 61, at 32 ("Legal fictions are maintained because they work. They become legal fantasies when they no longer work, when they have lost touch with whatever it is that makes the legal process function effectively."); see also Babcock, *supra* note 59, at 393 (discussing public trust doctrine as successful legal fiction and examining how its purpose, protecting natural resources from conversion to non-communal uses, has served social good).

government.¹³¹ But, Marshall's fictions have endured well beyond their initial purpose and are no longer empirically or popularly supported. This is not always the case for other legal fictions whose factual underpinnings have been proven to be false.¹³² What is even more troubling is that they have survived largely intact despite the acknowledged harm they have done to Indians.¹³³ However, legal fictions, even harmful ones, are not easily removed.

Precedent is often cited as a reason to maintain certain legal fictions, even when they are later understood to be harmful.¹³⁴ The fact that so much Indian jurisprudence rests on Marshall's fictions may make it difficult to see how they can be extracted from the case law. They are now what Fuller calls "abbreviatory" fictions: a "convenient shorthand"¹³⁵ that courts retain for their expressive and rhetorical strength. They have become a "legal institution" in their own right; "the happening over and over again of the same kind of behavior" by judges.¹³⁶ The removal of these fictive premises, to which people have conformed their expectations, could upset those expectations by de-legitimizing much of the case law that followed the Trilogy.¹³⁷ But if that case law was built on fictive prem-

131. For a discussion of the public animosity that Marshall's opinions aroused, see *supra* note 41 and accompanying text. Marshall was less successful, in the short-term, defending the Federalist Party, whose view of a strong central government and Supreme Court succumbed to the more populist views of Jackson's Democratic Party. See Faragher, *supra* note 86, at 463 (describing major policy initiatives of Jackson's presidency, including his opposition to the Bank of the United States and his decision to remove Cherokee Nation from its lands despite Supreme Court's decision prohibiting him from doing this).

132. See Smith, *supra* note 61, at 149 ("[S]ometimes judges' suppositions turn out to be inaccurate, and the courts sometimes are open to abandoning the new legal fiction—and generally the legal rule for which it was a premise—when sufficient proof is offered to demonstrate its falsity.").

133. See Mezey, *supra* note 3, at 3 (discussing how television show *Deadwood* translated violence implicit in *M'Intosh*, giving it an afterlife—"what allows a work (or event or idea) to go on living and evolve over time and place and iteration. In its afterlife, the original is transformed and renewed."). Here, no translation has been necessary to keep Marshall's fictions alive; they have persisted on their own, retelling "the relationship of the state to violence and the paradox of the state's own legitimacy" given its roots in violence—the displacement of Indians from their homelands. *Id.* at 4.

134. Smith, *supra* note 61, at 1486 (identifying need to preserve legal continuity as "the traditional justification for classic legal fictions").

135. See FULLER, *supra* note 4, at 81 (quoting TOURTOULON, *supra* note 41, at 385); see also *id.* ("[M]any [fictions] that once served a historical purpose have been retained for their descriptive power. These descriptive fictions have been called 'the algebra of the law.'").

136. Cohen, *supra* note 1, at 845 n.85 ("[A] legal institution is something more than the way men act of a single occasion A legal institution is the happening over and over again of the same kind of behavior." (quoting U. Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609, 609 (1923))).

137. See Smith, *supra* note 61, at 1478. Smith explains: Judges often rely on and preserve new legal fictions—even in the face of evidence that they are false—because they serve a legitimating function and because their abandonment might have de-legitimizing conse-

ises, then it should not continue to hold sway.¹³⁸ Moreover, since Marshall's fictions have been confined to the relatively narrow field of federal Indian law, there is little risk that abandoning them would unravel other areas of the law.¹³⁹

One would think, as Fuller does, that once the false premises underlying a legal fiction, like those used by Marshall, are revealed—as Marshall did in *Worcester*—then the necessity for the fiction would disappear.¹⁴⁰ But perhaps it is too hard to rid the law of Marshall's legal fictions because they continue to appear true.¹⁴¹ Judges may cling to them because they have difficulty dealing with contradictory empirical evidence.¹⁴² The law can be unreceptive to the teachings of the social sciences and the changes in previously held understandings they bring about; “even when the lessons of social science penetrate the sphere of judicial decisionmaking, the

quences. Judges, in other words, recognize that the law often serves an expressive function, and they cling to premises, either consciously or subconsciously, that will produce legal rules with positive expressive value.

Id.

138. See Aultman, *supra* note 61, at 31 (“Lawyers act as if words were true because it is obvious that other words which might serve as precedent will not permit the achievement of desired objectives. There is utility in this mental process, but there is also danger. Legal fiction can easily reach the point of legal fantasy.”); see also Smith, *supra* note 61, at 1486 (noting that reliance on fictive precedent “usually smacks of circularity and is unlikely to be compelling in the long run”).

139. See Smith, *supra* note 61, at 1486; *id.* at 1487 (“The argument for stare decisis is strongest in those cases in which the new legal fiction has branched out, serving as the basis for a wide range of legal rules. In such cases, abandoning the new legal fiction risks creating avulsive legal change.”); see also FULLER, *supra* note 4, at 21 (saying that “[o]ne cannot introduce sweeping changes in linguistic usage by an arbitrary fiat; in general, new meanings grow only in places where they are needed”). Despite acknowledging that precedent can serve as “a reason to preserve a mistaken premise,” Smith argues, it cannot serve as “a reason to obscure the basis for the decision to preserve it.” Smith, *supra* note 61, at 1488. In contrast to the situation involving Marshall's use of the legal fiction doctrine, I argue in *What a Tall Tale They Tell* that abandoning the public trust doctrine would create avulsive changes in property law. See Babcock, *supra* note 59, at 403-404.

140. See FULLER, *supra* note 4, at 52 (“We eliminate the necessity for fiction in direct proportion as we eliminate premises from the law, as we disencumber the law of intellectualism [T]he necessity for fiction will vary directly with the number and inflexibility of the postulates assumed.”).

141. See *id.* at 70 (“[A] construction that appears to be nonfictitious, even though from a scientific standpoint it may be as inadequate as the most daring fiction, is harder to displace.”).

142. *Id.* at 116 (“[F]ew of [our metaphorical fictions] are completely dead. . . . This is particularly true in the social sciences, where the complexity of the fact-situation emphasizes and stimulates the human penchant for simplicity.”). Cohen argues:

The divorce of legal reasoning from questions of social fact and ethical value is not a product of crusty legal fictions inherited from darker ages. Even in the most modern realms of legal development one finds the thought of courts and of legal scholars traperzing around in cycles and epicycles without coming to rest on the floor of verifiable fact.

Cohen, *supra* note 1, at 814.

mechanisms for correcting legal rules tainted by new legal fictions are cumbersome and institutionally disfavored.”¹⁴³ But, as Cohen warns:

[C]ourts that shut their doors to such non-legal materials . . . will eventually learn that society has other organs—legislatures and legislative committees and administrative commissions of many sorts—that are willing to handle, in straightforward fashion, the materials, statistical and descriptive, that a too finicky judiciary disdains.¹⁴⁴

Judges also resort to legal fictions when the need for structure in the law is acute.¹⁴⁵ Perhaps this thought not only motivated Marshall, but also continues to influence modern judges who feel the need for structure in a field of law that is both difficult and foreign to many of them. But a structure that is empirically groundless can hardly provide a sound foundation for an entire field of law.

Marshall’s rhetorical styles may have also contributed to the endurance of his fictions. His practice of selecting historical details to support a rhetorical purpose¹⁴⁶ and to “avoid arguing the unarguable,” especially when his practical arguments depended on “controversial empirical claims,” reduced the importance of the facts underlying the legal principles he announced.¹⁴⁷ Similarly, Marshall’s avoidance of precedent, the justice and appropriateness of which future critics could always disparage, and his tendency to rely instead on more persuasive “safe and fundamental principles,”¹⁴⁸ also focused his readers on the transcendent principles being espoused and not on the facts to which they were being applied. Given the transient nature of the assumptions and prejudices that often motivate an earlier decision, it is easier for a modern judge not to confront the factual errors in that decision, but to decide instead that the safest course is simply to cite the case for its legal principles and not correct the factual record.

Fuller compares legal fictions to scaffolding—required for construction of a building, but once the building is built, it serves only to obscure

143. Smith, *supra* note 61, at 1439.

144. Cohen, *supra* note 1, at 834.

145. See FULLER, *supra* note 4, at xi (“A frequent and pervasive resort to fiction marks, then, those subjects where the urge toward systematic structure is strong and insistent.”).

146. Eisgruber, *supra* note 13, at 480. Eisgruber notes that in *McCulloch v. Maryland*, Marshall engaged in what he calls “a rhetorical recreation of the founding perspective.” *Id.* at 451.

147. See *id.* at 447-48. Eisgruber explains:

Marshall’s key rhetorical tactic . . . was to avoid arguing the unarguable. Practical arguments about likely results inevitably depended upon controversial empirical claims. . . . When claims are contestable, piling on reasons only calls attention to them and makes them suspect. John Marshall knew precisely when to stop arguing.

Id.

148. *Id.* at 440.

it.¹⁴⁹ In such a case, he says, the legal fiction can easily be removed because it “seldom becomes a ‘vested interest.’”¹⁵⁰ Perhaps Marshall’s fictions have become “vested interests.” States that persist in their desire to regulate Indians and their lands need Marshall’s fictions to justify their incursions into tribal sovereignty.¹⁵¹ Non-Indians who live on allotted land within Indian reservations and who wish to make use of tribal resources or open up tribal land for some self-serving commercial venture may also have the same vested interest in maintaining those fictions. Fuller also writes that “[m]uch of what appears to be strictly juristic and normative is in fact an expression, not of a rule for the conduction of human beings, but of an opinion concerning the structure of society.”¹⁵² This raises an even less pleasant explanation of why Marshall’s fictions have endured: racism.¹⁵³ The demeaning and suppressive effect of Marshall’s fictions on Indians is consistent with that conjecture.¹⁵⁴

What is interesting about the strength of Marshall’s fictions is that the Court appears more comfortable stepping away from his holding in *Worcester* affirming tribal sovereignty,¹⁵⁵ than abandoning those earlier fictitious assertions about Indians and how their land was acquired, even though Marshall himself rejected them. These assertions were known to Marshall at the time he wrote his Trilogy to be empirically unfounded. Yet, the Court continues to act upon them as if they were true with no sign of abandoning them or the harmful doctrines that they have spawned.¹⁵⁶ Because they are bad legal fictions that have caused serious harm to the cause of tribal sovereignty and to Indians in general, and because there is

149. FULLER, *supra* note 4, at 70 (citing JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 35 (2d ed., 1921)).

150. *Id.*

151. See Babcock, *supra* note 2, at 503-09 (discussing state intrusions into tribal sovereignty).

152. FULLER, *supra* note 4, at 131. See Lehman, *supra* note 126, at 39 (“Indeed, by its nature the law is woven into all the outposts of cultural conflict, and it serves as one of the principal instruments of grievance through which culture wars are waged.”).

153. See Williams, *supra* note 117, at 191; *id.* at 169 (explaining Indians’ conception of discovery doctrine as “the ‘separate but equal’ and *Korematsu* of United States race-oriented jurisprudence respecting their status and rights”); see also POMMERSHEIM, *supra* note 116, at 43 (saying Marshall’s belief “in the superiority of white republican policy” and his recognition that doctrines like discovery doctrine were indispensable to settling of America, led Marshall to frame opinions that reflected “despotic imperialism and racism and attendant federal hegemony in Indian affairs”).

154. See Babcock, *supra* note 2, at 514-15 (discussing some problems on modern reservations).

155. See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 362 (2001) (“Though tribes are often referred to as ‘sovereign’ entities, it was ‘long ago’ that ‘the Court departed from Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries.” (internal quotations and citations omitted)).

156. See FULLER, *supra* note 4, at 93 (“If judges and legal writers have used the fiction in the past, and are using it now, they will probably continue to use it in the future.”).

absolutely no good reason that they should continue to exist, federal Indian law should be rid of them.¹⁵⁷

VI. CONCLUSION

Although it seems difficult to believe that “intelligent human beings could be ‘deceived by the whimsical device of the fiction’—when one is viewing the thing from the perspective of history,”¹⁵⁸ judges have accepted Marshall’s Indian law fictions even when the empirical record supporting them is known to be false. The continuing power of those fictions to inform modern federal Indian jurisprudence is distressing and must be more than simply habit; a “groove in the nervous system.”¹⁵⁹ Other fictions have been abandoned over time, but not these. Later courts have been unwilling to see Marshall’s legal fictions in *M’Intosh* and *Cherokee Nation* as anything other than “logical deduction[s] from fixed principles, . . . [their] meaning . . . expressed only in terms of its logical consequences,”¹⁶⁰ thus giving these courts an excuse not to challenge the assumptions underlying them.

Felix Cohen frets that:

When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.¹⁶¹

This is what has happened to Marshall’s first two opinions; they have kept at bay any acknowledgement of the social forces that molded them at the time they were written and any consideration of the more modern social ideals by which they should be judged. The fact that later courts have not rejected Marshall’s fictions given the empirical evidence of their falsity

157. See *id.* at 50, n.4 (“No fiction should be allowed to work an injury.” (quoting BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 43 (Lewis ed., 1897))); see also Robert J. Miller, *Will Others Follow Episcopal Church’s Lead?*, INDIAN COUNTRY TODAY, Aug. 9, 2009, available at <http://www.indiancountrytoday.com/opinion/52646107.html> (reporting on Episcopal Church’s adoption of resolution calling for repudiation of doctrine of discovery and urging United States to review “its historical and contemporary policies that contribute to the continuing colonization of Indigenous Peoples”).

158. FULLER, *supra* note 4, at 93.

159. *Id.* at 54 (“[T]he complicated psychological process of habit formation may be described by saying that the repetition of a reaction ‘cuts a groove’ in the nervous system.”).

160. Cohen, *supra* note 1, at 844.

161. *Id.* at 812. Cohen goes on to predict that someday “[s]ocial policy” will be comprehended not as an emergency factor in legal argument but rather as the gravitational field that gives weight to any rule or precedent, whether it be in constitutional law, in the law of trade-marks, or in the most technical details of legal procedure.” *Id.* at 834.

could reflect the fact that they continue to have a utilitarian purpose; namely, that they hide normative choices by judges that disfavor Indians.¹⁶² This is a deeply troubling conclusion that should trigger some introspection by future judges when asked to apply Marshall's fictions in a way that undermines what remains of tribal sovereignty.

162. See Smith, *supra* note 61, at 1439. Smith explains: [S]ometimes judges' suppositions simply turn out to be inaccurate, and the courts sometimes are open to abandoning the new legal fiction—and generally the legal rule for which it was a premise—when sufficient proof is offered to demonstrate its falsity. In these cases, the new legal fiction is not intended to mask a normative choice but simply is based on a misunderstanding or misreading of empirical reality.

Id.

